No. 86-1449

Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL INSURANCE COMPANY & COMETALS, INC.,
Petitioners,

v.

THE UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF AMICUS CURIAE OF THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF PETITIONERS

FREDERICK L. IKENSON
Counsel of Record for Amicus Curiae
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 483-8900

Of Counsel:
JOHN B. PELLEGRINI
ROSS & HARDIES
575 Fifth Avenue
New York, New York 10017-2470
(212) 949-7075

GILBERT LEE SANDLER
SANDLER & TRAVIS, P.A.
444 Brickell Avenue
Miami, Florida 33131
(305) 358-2413

May 1, 1987

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	5

TABLE OF AUTHORITIES

CASES:	Page
Air-Sea Brokers, Inc. v. United States, 596 F.2d 1008 (C.C.P.A. 1979)	3
Akbarin v. INS, 669 F.2d 839 (1st Cir. 1982)	3
Clayton Chemical & Packaging Co. v. United States, 383 U.S. 821 (1966)	2
Free Enterprise Canoe Renters Ass'n v. Watt, 711 F.2d 852 (8th Cir. 1983)	3
Heckler v. Community Health Services, 467 U.S. 51 (1984), *reh'g denied*, 106 S. Ct. 1289 (1986)	3,4
LeCroy Research Corp. v. Commissioner, 751 F.2d 123 (2d Cir. 1984)	3
Pratte v. NLRB, 683 F.2d 1038 (7th Cir. 1982)	3
TRW, Inc. v. FTC, 647 F.2d 942 (9th Cir. 1981)	3
United States v. Context-Marks Corp., 729 F.2d 1294 (11th Cir. 1984)	3
United States v. Locke, 105 S. Ct. 1785 (1985)	3
Yang v. INS, 574 F.2d 171 (3rd Cir. 1978)	3
OTHER:	
S. Rep. No. 1170, 74th Cong., 1st Sess. (1935)	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1449

FEDERAL INSURANCE COMPANY & COMETALS, INC.,
Petitioners,

v.

THE UNITED STATES,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

---

BRIEF AMICUS CURIAE OF THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Amicus curiae, the Customs and International Trade Bar Association (the "Association"), is a national organization of over 300 attorneys who practice in the customs and international trade area.[1] The Association's members represent importers, domestic manufacturers, exporters, customs brokers, surety companies, and others before the

---

[1] The parties' consent letters have been filed with the Clerk of the Court.

United States Customs Service, other federal agencies, and the courts. Motivated by a desire to ensure the orderly development of legal principles, particularly with respect to our nation's growing trade jurisprudence, and with an appreciation of their practical implications, the Association believes this case to be of great significance to its members and their clients.[2] In light of this belief, the Association urges that the Federal Circuit's absolute pronouncement below that estoppel may never be invoked against the Government in its duty-collecting activities should be reviewed.

SUMMARY OF ARGUMENT

The principal issue raised in this case, whether the Court of Appeals for the Federal Circuit was correct in holding that equitable estoppel is never available as a defense in a case involving the collection of import duties, is of great importance to the international trade community. In addition, the holding of the court below is in conflict with decisions of this Court as well as with decisions of the other federal courts of appeals. These circumstances argue strongly for granting certiorari.

---

[2] This is the first occasion on which the Association has submitted a brief *amicus curiae* to this Court. In 1966, the Association's predecessor, the Association of the Customs Bar, submitted such a brief in support of a petition for a writ of certiorari in a case involving a fundamental fairness issue in the adjudication of a customs valuation dispute. *See Clayton Chemical & Packaging Co. v. United States*, 383 U.S. 821 (1966) (*per curiam*, granting certiorari and reversing). Also, more recently, the Chief Judge of the United States Court of International Trade directed the clerk of that court to serve the Association with an order inviting the submission of *amicus curiae* briefs on the right to trial by jury in customs cases. *Washington International Insurance Co. v. United States*, Court No. 81-12-01678 (Ct. Int'l Trade April 17, 1987) (unpublished). The Association's Board of Directors has determined, on April 21, 1987, to submit such a brief.

ARGUMENT

In 1979, the United States Court of Customs and Patent Appeals, a predecessor to the United States Court of Appeals for the Federal Circuit, categorically ruled that equitable estoppel "is not available against the Government in cases involving the collection or refund of duties on imports." *Air-Sea Brokers, Inc. v. United States*, 596 F.2d 1008, 1011 (C.C.P.A. 1979). Since that time, however (and before then as well), numerous circuit courts of appeals have expressly held that estoppel may be invoked against the Government. *LeCroy Research Corp. v. Commissioner*, 751 F.2d 123 (2d Cir. 1984); *Free Enterprise Canoe Renters Ass'n v. Watt*, 711 F.2d 852, 857 (8th Cir. 1983); *Pratte v. NLRB*, 683 F.2d 1038, 1041 (7th Cir. 1982); *Akbarin v. INS*, 669 F.2d 839, 842 (1st Cir. 1982); *TRW, Inc. v. FTC*, 647 F.2d 942, 950-51 (9th Cir. 1981); *Yang v. INS*, 574 F.2d 171, 175 (3d Cir. 1978). *But see United States v. Context-Marks Corp.*, 729 F.2d 1294, 1297 n. 4 (11th Cir. 1984). More significantly, in 1984, this Court explicitly left open the issue of whether estoppel may run against the Government under some circumstances. *See Heckler v. Community Health Services*, 467 U.S. 51, 60 (1984), *reh'g denied*, 106 S. Ct. 1289 (1986). *See also United States v. Locke*, 105 S. Ct. 1785, 1802 (1985) (O'Connor, *J.*, concurring).

Notwithstanding the various appellate court rulings and this Court's admonition against absolutism (*see Community Health Services*), in November 1986, two judges of the Federal Circuit, viewing *Air-Sea Brokers* as binding precedent, reiterated and adopted the categorical rule that "no estoppel can arise against the sovereign act of tax collection." Pet. App. A at 7a-8a. There was no analysis at all of *Community Health Services* or of the foregoing circuit court decisions, although the dissenting judge discussed

Community Health Services at length. Pet. App. A at 21a *et seq.*[3]

The importance of this issue and the need for this Court to resolve the continuing conflict between the Federal Circuit and other courts are quite real. We are obviously not unmindful of the fallback position of the lower court majority that even if estoppel were not precluded in this case, it would be to no avail, since the Government allegedly did nothing wrong. The majority viewed as benign the fact that the Customs Service (a) knowingly permitted a broker, repeatedly proven untrustworthy, to operate under license and (b) in so doing, placed in peril those importers who dealt with him.

However, for the reasons presented in the petition (at 13-17) and in Judge Newman's dissent (Pet. App. A at 17a-27a), that position is at best highly questionable. The majority below did not appear to be sufficiently impressed by the strong legislative admonition: "By licensing them [customhouse brokers, termed 'quasi officers of the Treasury'] the Treasury holds out to importers that it has investigated their character and represents to such importers that they are capable and honest in their conduct . . . ." S. Rep. No. 1170, 74th Cong., 1st Sess. 3 (1935). For the court below to hold that Treasury may make such representations falsely, with impunity, is simply another way of saying that estoppel may not be invoked against the Government when acting in its sovereign capacity. As noted above, however, such a rule does not reflect the law as articulated by this Court or by most of the federal courts of appeals.

---

[3] The only mention of *Community Health Services* in the majority's opinion occurred in its discussion of the trial court's decision ("The court also noted the decision of the Supreme Court in *Heckler v. Community Health Services of Crawford*, 104 S. Ct. 2218, 2224 (1984), which implies that the government could be estopped although on a more stringent standard than a private litigant."). Pet. App. A at 6a-7a.

CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK L. IKENSON
Counsel of Record for
Amicus Curiae
1875 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 483-8900

Of Counsel:
JOHN B. PELLEGRINI
ROSS & HARDIES
575 Fifth Avenue
New York, New York 10017-2470
(212) 949-7075

GILBERT LEE SANDLER
SANDLER & TRAVIS, P.A.
444 Brickell Avenue
Miami, Florida 33131
(305) 358-2413

May 1, 1987